should not be compelled to acquire the bankrupt's property subject to such liabilities and it has been said that "when the Official Assignee finds that the property will not produce a surplus beyond the value of the liability affecting it he may be able to disclaim it and so get rid of the property and the liability together." — See the judgment of Jessel M.R. in *Ex parte Walton* (1).

I am not concerned really at this stage as to what is the effect of a disclaimer in such a case as this, but there apparently is no doubt that it would result in depriving the tenant of any further interest in the premises. I can only say what Scrutton L.J. has said:—

"It seems to me that the persons responsible for drafting of this last statute have shown a great lack of consideration of the results of various events which may be expected to happen in some cases of tenancy. I am amazed that it never appears to have struck them to consider what was to occur in the case of bankruptcy." (*Reeves* v. *Davies* (2)).

I feel the same sympathy for the tenant in this case, but I am afraid I have no alternative but to grant the leave prayed for by the Assistant Official Assignee.

Order accordingly.

Solicitors: *Das & Co.; S. Seenivasagam & Sons.*

LIM BABA v. PUBLIC PROSECUTOR

[A. Cr. J. (Ismail Khan J.) February 1, 1962]

[Malacca — Criminal Appeal No. 12 of 1961]

Criminal Law and Procedure — Penal Code, ss.34, 366 — Abduction of woman with intent to have illicit sexual intercourse.

Evidence Ordinance, 1950, ss.146, 148 to 152, 157 — Evidence of complainant — Corroboration of by complainant — Whether cross-examination as to credit of complainant relevant.

The appellant was charged and convicted by the President of the Sessions Court under section 366 of the Penal Code for abducting a woman of 19 years with intent to have illicit sexual intercourse with her and sentenced to one and half years' imprisonment and a fine of $200. In this appeal it was contended for the appellant: (1) the charge was defective because no reference was made to section 34 of the Penal Code; (2) the learned President had erred in placing on the appellant the onus of proving that no offence had been committed; (3) the President misdirected himself in accepting as corroboration the complaint of the complainant and (4) the learned President was wrong in disallowing any questions by the appellant's counsel as to her character.

Held: (1) the charge was correctly framed because there was evidence that both the appellant and his companion had removed the complainant in a car and that shortly afterwards they both had sexual intercourse with her;

(2) it was clear that throughout the trial the President had fully appreciated that the onus was always on the prosecution;

(3) there was no misdirection because a complaint if made immediately would be treated as corroboration in view of section 157 of the Evidence Ordinance, 1950 although in England it would not be so regarded;

(4) in this case where the case for the prosecution rested almost entirely on the corroborated evidence of the complainant, a cross-examination addressed to the credit of the complainant would have been especially relevant.

Cases referred to:—

(1) *Rex* v. *Job Whitehead* [1929] 1 K.B. 102.

(2) *Rex* v. *Velayuthan* [1935] M.L.J. 277.

(3) *Rex* v. *Koh Soon Poh* [1935] M.L.J. 120.

(4) *Mahomed Mian* v. *Emperor* A.I.R. 1919 Pat. 515, 516.

(5) *Bombay Cotton Manufacturing Co.* v. *Motilal Shivlal* I.L.R. (1915) 39 Bom. P.C. 386.

CRIMINAL APPEAL.

S. M. Yong for the appellant.

Mohd. Salleh bin Abas (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: The appellant was charged as follows:—

"That you on 5.2.61 at about 2.30 a.m. at the Coronation Park, Malacca in the State of Malacca, together with another person not in custody, abducted a woman, to wit one Lim Sor Kim (f), aged 19 years, with intent that she may be forced into illicit intercourse and that you thereby committed an offence punishable under section 366 of the Penal Code."

According to the prosecution, at about 2 a.m. on 5th February, 1961, the complainant P.W.3 and five other friends left for the Coronation Park, Malacca, after a dance at the Seaview Hotel. There they split up into couples, the complainant going with P.W.8 to the Pavilion, one couple, P.W.4 and P.W.10, remaining in a car some distance away and the remaining couple, P.W.9 and P.W.11, somewhere near this car. While P.W.3 and P.W.8 were seated talking at the Pavilion two men appeared and attacked P.W.8 with a bottle. The appellant was one of the two men. The appellant and his companion then drove away in a car with the complainant to the Jelutong Chinese Cemetery where the complainant was sexually assaulted by both the appellant and his companion. After the assault the complainant was taken away in the car and left at a spot in the vicinity of the Portuguese Settlement near P.W.8's house. Immediately on her release the complainant related to P.W.4 and P.W.10 her distressing experience at the hands of the appellant and his companion. P.W.4, a police inspector, took the complainant in his car to the police station. On the way they came across the appellant's car SR 5270 when the complainant pointed out the appellant and his companion to P.W.4. After dropping the complainant near the Convent P.W.4 started after the appellant's car. Somewhere near Templer Avenue the appellant's companion got out. The appellant then drove on through a police check point to Bukit Kajang Estate where he abandoned his car and escaped.

In his defence the appellant denied the charge. He said that he was driving home at about 11 p.m. on the day in question when he met a person whom he did not know very well and who compelled him to go to the Coronation Park where he saw a man and the complainant "doing the sexual act". His companion then assaulted the man and then compelled him (the appellant) to take him and the complainant

away in his car until they reached the Jelutong Chinese Cemetery where he was asked to get down from the car. After about an hour he had to drive the car with the other two to Ujong Pasir where the girl got off. His companion stopped at Templer Avenue. He was on his way to the police station when P.W.4 saw him.

In the event the learned President found the appellant guilty, convicted him and sentenced him to imprisonment for 1½ years and a fine of $200. This appeal is against both conviction and sentence.

Several objections to the conviction were urged in this appeal.

It was objected that the charge was defective in that no reference was made to section 34 of the Penal Code. In my view the charge was correctly framed. There was evidence that both the appellant and his companion had removed the complainant in a car and that shortly afterwards they both had sexual intercourse with her. It was also urged that the learned President had erred in placing on the appellant the onus of proving that no offence had been committed. Reliance was placed on the following passage in his judgment:—

"Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first and natural presumption must be that he has abducted her with the intention of having sexual intercourse with her, either forcibly or with her consent after seduction. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under section 106, Indian Evidence Act, to prove that intention."

This is actually a quotation from *Ratanlal on Crimes*, 18th edition, page 893. Taken in isolation this passage may have the effect suggested by counsel for the appellant. There are, however, other passages in the judgment which make it abundantly clear that throughout the trial the learned President had fully appreciated that the onus was always on the prosecution. Indeed in this case the defence was only called on when at the close of the case for the prosecution the learned President was satisfied from the evidence adduced that the ingredients of the offence had been established.

It was also contended that the learned President had misdirected himself in accepting as corroboration the complaint by P.W.3 shortly after the alleged occurrence of the facts complained of. I fail to see any misdirection having regard to section 157 of our Evidence Ordinance, 1950 which reads:—

"In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

It is true that in an English case *Rex* v. *Job Whitehead* (1), it was held that a witness cannot corroborate himself. The question of the admissibility of such an immediate complaint was dealt with in the case of *Rex* v. *Velayuthan* (2), a Singapore case. In that case Whitley J. referred to section 157 of Ordinance No. 53 (Evidence) (now section 158 of Cap. 13 S.S.) which is identical with section 157 of our Evidence Ordinance. He said that this section has no counterpart in the English law of evidence and therefore a complaint if made immediately would be treated as corroboration, although in England it would not be so regarded. Its value and strength as corroboration must depend in every case upon the circumstances under which it is made. The observations of Terrell J. on this point in the case of *Rex* v. *Koh Soon Poh* (3) are to the same effect.

Finally, it was objected that the learned President was wrong in disallowing any questions by the appellant's counsel as to the complainant's character. From the notes of evidence it would appear that early in the cross-examination of the complainant counsel for the appellant sought to put a question to her which tended to injure her character. The prosecution objected to the question on the ground that under section 155 of the Evidence Ordinance the credit of the witness could only be impeached in cases of rape or attempted rape. In reply counsel for the appellant only quoted this passage from *Ratanlal*, 18th edition, page 894:—

"In a trial for offences under sections 366, 366A and 376 a direction to the jury to the effect that the general moral character of the girl is of no consequence amounts to a misdirection."

In the result leave to cross-examine the complainant as to her character was refused.

As a general proposition it can be said that the character of a complainant is immaterial in criminal cases. This statement is subject to the qualification that in cases of rape or attempted rape cross-examination of the complainant is permitted to show that she is generally of immoral character. Again under section 146 of the Evidence Ordinance a witness may be cross-examined as to credit by injuring his character. Questions could be put relating to facts in issue or matters necessary to be known in order to determine whether or not the facts in issue existed. If they are put to shake the credit of a witness the Court has complete dominion over them and may forbid questions even though they have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no discretion to forbid such questions though they may be indecent or scandalous. (See *Mahomed Mian* v. *Emperor* (4)). In a Privy Council case *Bombay Cotton Manufacturing Company* v. *Motilal Shivlal* (5), it was observed by Sir George Farwell, in speaking of cross-examination addressed to the credit of a witness in the box, that "it is most relevant in a case..... where everything depends on the judge's belief or disbelief in the witness's story".

I should have thought that in this case where the case for the prosecution rested almost entirely on the evidence of the complainant, corroborated it is true, but only by her complaint to P.W.4 and P.W.10, a cross-examination

addressed to the credit of the complainant would have been especially relevant. The learned President had forbidden "all questions relating to the character of the complainant". It is not at all clear what the grounds are for disallowing such questions and in the circumstances it is not possible to decide whether in disallowing any such cross-examination of the complainant the learned President had addressed his mind to the provisions of sections 146, 148 to 152 of the Evidence Ordinance.

I cannot help feeling that the appellant has been prejudiced in his defence and that there must be a retrial.

The appeal is allowed. The case will be remitted to the Sessions Court for retrial before another President.

Appeal allowed. Retrial ordered.

Solicitors: *S. M. Yong & Co.*

PUBLIC PROSECUTOR v. BONG SWEE KONG

[A. Cr. J. (Ismail Khan J.) February 1, 1962]

[Malacca — Criminal Appeal No. 8 of 1961]

Road Traffic Ordinance, 1958, ss.2 and 98 — Motor cycle used for carriage of goods without carrier's licence — Whether motor cycle is a "goods vehicle" — Meaning of "goods" — "Goods vehicle."

On a charge under section 98(1) of the Road Traffic Ordinance, 1958 the onus on the prosecution is to establish that the respondent was carrying on his "motor vehicle", "goods" within the meaning of section 2 of the Ordinance. Whether the "goods" were carried for the respondent's trade or business is a matter of inference to be made from the circumstances of the case such as the nature of the respondent's business and the kind of goods carried.

Cases referred to:—

(1) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 113.

(2) *Chua Lai Seng* v. *Public Prosecutor* [1961] M.L.J. 144.

CRIMINAL APPEAL.

Mohd. Salleh bin Abas (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Cur. Adv. Vult.

Ismail Khan J.: The respondent was charged with using a motor cycle for the carriage of goods without having a carrier's licence contrary to section 98(1) of the Road Traffic Ordinance, No. 49 of 1958.

The facts which are not in dispute are as follows: The respondent is a sundry goods shopkeeper at the 7th mile Durian Tunggal, Malacca. On 30th December, 1960, he was riding his motor cycle at Hill Road, Malacca, when he was stopped by a police constable P.W.1. He was found carrying on the carrier of his motor cycle a basket containing chillies, brushes, beans, meehoon and fruits. It was a big basket and with the commodities weighed about 50 katties. The respondent had a licence for his motor cycle but no carrier's licence.

The learned Magistrate acquitted and discharged the respondent without calling for his defence.

This appeal is against the order of acquittal.

The relevant provisions of the Ordinance are as follows:—

Section 98(1) reads:—

"Subject to the provisions of this Part of this Ordinance no person shall use a motor vehicle, or cause or permit a motor vehicle to be used, for the carriage of goods unless there is in force in respect of such vehicle a valid carrier's licence granted under this Part of this Ordinance.....".

Section 2 defines "motor vehicle", "goods vehicle", "goods" as follows:—

"motor vehicle" means every description of vehicle propelled by means of mechanism contained within itself and constructed or adapted so as to be capable of being used on roads, and includes a trailer;

"goods vehicle" means —

(a) any motor vehicle constructed or adapted for use for the carriage of goods; and

(b) any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers;

but does not include a private motor car drawing a trailer for purposes unconnected with trade or business;

"goods" means anything, including livestock, carried on or in a motor vehicle for the purposes of any trade or business but does not include —

(a) equipment ordinarily used with the vehicle;

(b) articles of merchandise carried by a person on or in the vehicle solely for the purpose of exhibition as samples;

(c) articles carried by a person on or in the vehicle for use in the exercise of his trade, business or profession and not for sale.

In his grounds of judgment the learned Magistrate expressed his doubts as to whether a motor cycle is within the meaning of the definition of "goods vehicle". He is inclined to the view that it is not, unless the motor cycle is constructed and adapted for use for the carriage of goods. I cannot see anything in the definition to support this view. According to the definition a goods vehicle may be constructed and adapted for use for the carriage of goods, and if not so constructed and adapted for such use, it becomes a goods vehicle when used for the carriage of goods solely or in addition to passengers. It is clear that the only type of vehicle excepted from the definition is a private motor car drawing a trailer for purposes unconnected with any trade or business. There is no other exception.

The learned Magistrate also held that the mere carriage of goods by the respondent is no offence as it is only an "act in the course of his trade or business but that he commits an offence if he in the course of carrying sells" the goods. In my opinion this is to misread the definition of the word "goods". The learned Magistrate evidently had in mind exception (c) in the definition. This exception and the other two exceptions are irrelevant for consideration in this